IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78- 78-5944

ROOSEVELT GREEN, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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I N D E X

TABLE OF AUTHORITIES

Cases Cited:

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QUESTION PRESENTED

I.

Did the trial court's refusal to allow into evidence certain testimony, ostensibly in mitigation, when the testimony proffered was plainly hearsay and inadmissible under Georgia rules of evidence, violate any recognized federal constitutional right?

STATEMENT OF THE CASE

Roosevelt Green was convicted in Monroe County, Georgia, Superior Court for the December 12, 1976, murder of Teresa Carol Allen. On January 28, 1978, Green was sentenced to death.

Green's companion in the murder, Carzell Moore, was previously tried, convicted and sentenced to death. Moore's conviction and sentence were affirmed by the Supreme Court of Georgia. Moore v. State, 240 Ga. 807, ___ S.E.2d ___ (1978). This Court denied Moore's petition for writ of certiorari to the Supreme Court of Georgia. Moore v. Georgia, ___ U.S. ___, 58 L.Ed.2d 249 (1978)(No. 78-5159).

Green's conviction and sentence were affirmed by the Supreme Court of Georgia in Green v. State, 242 Ga. 261, ___ S.E.2d ___ (1978).

Additional facts will be recounted in the remaining portion of this brief if necessary to address adequately any issue raised in the petition for writ of certiorari.

REASONS FOR NOT GRANTING THE WRIT

I. THE TRIAL COURT'S REFUSAL TO ALLOW INTO EVIDENCE CERTAIN TESTIMONY, OSTENSIBLY IN MITIGATION, WHEN THE TESTIMONY PROFFERED WAS PLAINLY HEARSAY AND INADMISSIBLE UNDER GEORGIA RULES OF EVIDENCE, DID NOT VIOLATE ANY RECOGNIZED FEDERAL CONSTITUTIONAL RIGHT.

The sole issue presented by Petitioner as a reason for granting the writ is the refusal of the trial court to allow Petitioner to present testimony of a witness in mitigation even though it is clear under Georgia law that the testimony sought was inadmissible hearsay. The witness, Thomas Pasby, according to Petitioner, would testify that Carzell Moore had admitted shooting the victim.[1/]

In the present case, Green sought to introduce inadmissible hearsay into evidence during the penalty phase of his trial. Upon the State's objection, the trial court excluded the testimony. The issue was raised on direct appeal to the Supreme Court of Georgia, which upheld the action of the trial court.

Quoting from Little v. Stynchcombe, 227 Ga. 311(2), 180 S.E.2d 541 (1971), the court held: "Code § 38-301 provides: 'Hearsay evidence is that which does not derive its value solely from the credit of the witness, but rests mainly on the veracity and the competency of other persons. The very nature of the evidence shows its weakness, and it is admitted only in specified cases from necessity.' Furthermore, 'Declarations by another person to the

1/ Such testimony was not excludable as hearsay at Moore's trial. Ga. Code § 38-414; Somers v. State, 116 Ga. 535, 42 S.E. 779 (1902); Green v. State, 115 Ga. App. 685, 155 S.E.2d 655 (1967).

effect that he, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused upon his trial.'" Green v. State, 242 Ga. 261, 271 ___ S.E.2d ___ (1978) (citations omitted). The court further found that the testimony sought to be admitted fit under no exception to the hearsay evidence rule recognized in Georgia. Id. at 271-72.

In Lockett v. Ohio, ___ U.S. ___, 98 Sup. Ct. ___, 57 L.Ed.2d 973 (1978), this Court recognized the need for "individualized consideration" in capital cases. However, such individualized consideration does not require suspension of the rules of evidence, the purpose of which is to insure that the jury receive and consider only competent evidence. Under the State rules of evidence, the testimony sought to be introduced by Petitioner was clearly inadmissible hearsay and plainly not competent evidence.

Further, the Supreme Court of Georgia noted that ". . . some authorities do recognize as a mitigating circumstance that 'a defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor constitutes a mitigating circumstance.'" Green, supra, 242 Ga. 272.[2/] But as the Supreme Court of Georgia found, "The defendant's participation during the course of the criminal enterprise in leaving his kidnap victim with his armed accomplice on a lonely road while he went for gas could not on any reasonable basis be termed minor participation." Id. at 272-73.

Finally, after having considered the brutal facts of the kidnap, rape and murder of Teresa Carol Allen and Green's part in it, the court stated: "While we do not hold that there would never be

2/ See, e.g., Lockett v. Ohio, supra, 57 L.Ed.2d at 992

a case in which the declaration against interest exception to the hearsay rule should be extended to declarations against penal interests, the facts of the appellant's case do not justify such an extension." Id. at 273.

Therefore, because the testimony which Petitioner sought to introduce at the penalty phase of his trial was inadmissible hearsay under Georgia rules of evidence and found to be so by the Supreme Court of Georgia, no federal constitutional question has been presented which merits review by this Court.

CONCLUSION

This Court should refuse to grant the writ of certiorari because no sufficient reason for review has been set forth by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon the Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper address and adequate postage to:

Mr. Richard Milam
Attorney for the Petitioner
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This 6th day of February, 1979.

JOHN C. WALDEN